

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

AIMCO MICHIGAN MEADOWS	)	
HOLDINGS, LLC,	)	
Plaintiff,	)	
	)	
vs.	)	1:05-cv-088-LJM-WTL
	)	
GENUINE PARTS COMPANY,	)	
Defendant.	)	

ORDER

This matter is before the Court on a Motion to Dismiss filed by defendant, Genuine Parts Company (“Genuine Parts”). Plaintiff, AIMCO Michigan Meadows Holdings, Inc. (“AIMCO”), brings this direct cost recovery action against Genuine Parts pursuant to CERCLA §9607(a)(4)(B). Genuine Parts has moved to dismiss this case, alleging that AIMCO is not an innocent party under the law and therefore this Court has no subject matter jurisdiction to entertain its complaint. . Genuine Parts argues that AIMCO, the current owners of an apartment complex and adjoining retail center, is not an innocent party because a former tenant of a former owner of the adjoining retail center, Accent Cleaners, caused contamination to the ground water at the time it was in operation.

In its Motion to Dismiss, Genuine Parts asserts that AIMCO purchased the Michigan Meadows Apartments on December 29, 1999. Included in the purchase was a retail center known as Michigan Plaza. Prior to AIMCO’s purchase, a dry cleaners, Accent Cleaners, had operated in the Michigan Plaza location. The cleaners used a chemical that, when discharged into the environment, can break down into a hazardous substance that can pollute adjacent groundwater.

Prior to its purchase of the property, AIMCO hired a consultant to conduct a Phase I

Environmental Site Assessment (“ESA”) in order to identify any environmental problems, which AIMCO was required to do. The consultant, Commercial Inspectors, LLC (“CI”), in April of 1999, failed to identify any environmental concerns. CI, however failed to interview local health officials, and in other ways failed to distinguish themselves according to standards of the inspection industry. AIMCO bought the property without notice of the environmental problems that all now agree did exist. The fact of CI’s failure to conduct itself according to the standards of the industry is not at issue. All agree that CI failed to properly perform its assigned task.

Upon learning of a possible environmental problem after the purchase of the property, AIMCO engaged the services of another consultant, Mundell & Associates. Mundell’s examination was apparently much more thorough than CI’s had been. Mundell reported, among other things, that former tenant Accent Cleaners had been identified as a generator of hazardous waste as had Genuine Part’s predecessors, GM Plant 10 and Allison Plant 10. All of this release of hazardous material on the premises had occurred before AIMCO’s purchase of the complex and Plaza. Mundell’s report, issued May 5, 2005, identified the purchased site as a “potential concern.” The Indiana Department of Environmental Management (“IDEM”) notified AIMCO as early as August 2004 that Accent Cleaners had been a source of contamination from chlorocarbons.

Genuine Parts, based on the forgoing information, argues that AIMCO cannot bring a §9607 action because it is not nor can it be an innocent party. Genuine Parts urges that AIMCO is in fact itself a potentially responsible party.

AIMCO invites the Court to declare that it is an innocent purchaser of the contaminated site and, as such, has the right to bring a §9604(a)(4)(b) action. The innocent purchaser exemption found at §9607(b)(3) exempts from liability those persons:

otherwise liable who can establish by a preponderance of the evidence that the release or threat of a release of a hazardous substance and the damages therefrom were caused solely by . . . (3) an act or omission of a third party other than an employee or agent of the defendant, or one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant.

AIMCO asserts that it is an innocent purchaser under this section of the law.

Genuine Parts, on the other hand, asserts that AIMCO has, as a matter of law, an indirect contractual relationship with Accent Cleaners. That indirect relationship exists, says Genuine Parts, because Accent Cleaners was a tenant of the former owner of the premises purchased by AIMCO. Genuine Parts does recognize an exception to this rule that is stated in §9601(35)(A). There will be no liability for the purchaser if

. . . the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which in the subject of the release or threatened release was disposed of on, in, or at the facility.

Genuine Parts further asserts that AIMCO did have reason to know of the hazardous material release before the purchase. Had AIMCO retained a competent consultant, it would have been aware of the pollution problem.

Genuine Parts' argument is that AIMCO cannot be an innocent party because it has an indirect contractual relationship with a known contributor to the pollution problem and that it should have known of the problem before the purchase and, indeed, would have known, had its consultant not bungled the job. Again, Genuine Parts asserts that because AIMCO cannot be an innocent purchaser, it cannot maintain a §9607(a)(4)(b) action.

AIMCO argues that it is an innocent purchaser because AIMCO has not contaminated the

ground water or the soil, it is not in a direct or indirect contractual relationship with a known polluter of the site, and it has conducted itself in a reasonable fashion after being notified of the action of the former tenant. This all being true, says AIMCO, the mistakes of its consultant are irrelevant.

The initial issue, then, is whether AIMCO, in purchasing the property from which the tenant of a prior owner released a contaminant into the soil, can be said to have an indirect contractual relationship within the meaning of that term as it is used in 42 U.S.C. §9607(b)(3). All the parties agree that Accent Cleaners was a tenant of a former owner. There is no dispute of fact on this point. All are in agreement that Accent Cleaners did whatever polluting it did, at a time before AIMCO became the land owner.

This Court can find no case that holds that the purchaser of property upon which hazardous materials had been introduced into the ground water is in an indirect relationship with a prior tenant of the seller of the property in question. There is a case very close to the factual underpinnings of the instant case in which no indirect relationship was found. In State of New York v Lashins Arcade Co., 856 F. Supp 153 (S.D.N.Y. 1994), a defendant was allowed the innocent party defense when it had purchased the property from an entity whose prior tenant had operated a dry cleaning establishment and whose prior tenant had contributed hazardous waste to the site. In affirming the District Court Judge on appeal, the Second Circuit said, “In this case, the only one of the allegedly offending third parties with whom Lashins [the buyer] had a contractual relationship was Milton Baygell [the seller]. Further, Baygell’s allegedly offending conduct [leasing property to a polluting dry cleaners] did not “occur in connection with a contracting relationship . . . with [Lashins] within the meaning of §9607(b)(3) because of its contractual relationship with Baygell.” *State of New York v. Lashins Arcade Co.*, 91 F.3d 353 (2<sup>nd</sup> Cir. 1996).

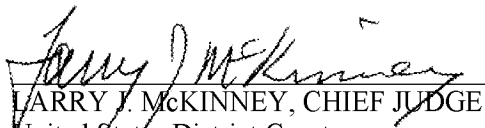
The *Lashins* case is the closest case this Court could find on the issue of indirect contractual relationship and the requirement that the indirect contractual relationship have some relationship to the party that introduced the contaminant into or onto the site. Genuine Parts does offer cases to support its view but they are not factually similar. Here, AIMCO is in the same relationship with the cleaners as was Lashins in the New York case. The reasons for treating AIMCO as an innocent party are the same as those for treating Lashins as an innocent party. Admittedly, the posture of the two cases is different – AIMCO is plaintiff and Lashins was the defendant – yet the conclusion about the status of the party under §9607(b)(3) is the same.

Here, Genuine Parts may be suggesting in its argument that AIMCO cannot be considered an innocent party for an additional reason, which is fact-sensitive and does not lend itself to the Motion to Dismiss format. Genuine Parts suggests that AIMCO did not exercise “due care with respect to the hazardous substance concerned . . . in the light of all relevant facts and circumstances” within the meaning of § 9607(b)(3). The hiring of an allegedly incompetent consultant is cited as proof of the failure to exercise due care. AIMCO asserts that soon after it was shown to them that their consultant did not operate as it should have, AIMCO hired an additional consultant and has conducted itself according to the law from then until now. These are factual determinations inappropriate to a motion to dismiss addressing this Court’s subject matter jurisdiction. The Court will not address the issue except to point once again to the New York case cited.

For all these reasons the Motion to Dismiss is denied.

IT IS SO ORDERED this 30<sup>th</sup> of March, 2006.

Distribution attached.

  
LARRY J. MCKINNEY, CHIEF JUDGE  
United States District Court  
Southern District of Indiana

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